

### REMARKS

Claims 1-16 are pending in the present Application. Claim 15 has been amended, and Claims 20 and 21 have been added, leaving Claims 1 – 16, 20, and 21 for consideration upon entering the present Amendment.

Claim 15 has been amended to shorten the preamble.

Claim 20 has been amended to further claim the present invention. Support for Claim 20 can at least be found in Claim 15 and in the figures as originally filed.

Claim 21 has been amended to further claim the present invention. Support for Claim 21 can at least be found in Paragraph [0045] as originally filed.

Reconsideration and allowance of the claims are respectfully requested in view of the above amendments and the following remarks.

#### Information Disclosure Statement

Applicants note that the Examiner has signed but has not initialed the art on PTO Form A820 for the Information Disclosure Statement filed November 12, 2004. Applicants respectfully request that the art submitted in this Information Disclosure Statement be considered and a fully initialed PTO Form A820 be returned to the Applicants.

#### Claim Rejections Under 35 U.S.C. § 102(b)

Claims 1, 4, 5, and 12 stand rejected under 35 U.S.C. § 102(b), as allegedly anticipated by U.S. Patent No. 3,824,933 to Lind. Applicants respectfully traverse this rejection.

To anticipate a claim, a reference must disclose each and every element of the claim. *Lewmar Marine v. Variant Inc.*, 3 U.S.P.Q.2d 1766 (Fed. Cir. 1987). “The identical invention must be shown in as complete detail as is contained in the ... claim.” *Richardson v. Suzuki Motor Co.*, 868 F.2d 1226, 1236, 9 USPQ2d 1913, 1920 (Fed. Cir. 1989). Drawings and pictures can anticipate claims if they clearly show the structure which is claimed. *In re Mraz*, 455 F.2d 1069, 173 USPQ 25 (CCPA 1972). However, the picture must show all the claimed structural features and how they are put together. *Jockmus v. Leviton*, 28 F.2d 812 (2d Cir. 1928).

The Examiner alleges that Lind anticipates Applicants’ Claims 1, 4, 5, and 12, and uses the figures for support:

The patent to Lind teaches structure as claimed including a pallet comprising an upper deck (12) comprising a support material an upper frame member (figs. 1,2) supporting said upper deck, a plurality of foot members (16) disposed in physical contact with the upper frame member, the foot members are integrally formed with the upper frame member and a lower frame member in physical contact with the plurality of foot members.

(Office Action dated October 27, 2006 (hereinafter OA 10/06), page 2) Applicants respectfully disagree.

Claim 1 recites a pallet, comprising an upper deck comprising a support material; an upper frame member supporting said upper deck; a plurality of foot members disposed in physical contact with said upper frame member, wherein said foot members are integrally formed with said upper frame member; and a lower frame member disposed in physical contact with said plurality of foot members.

Lind is directed to “a load bearing pallet 10 made up of two identical halves 12 and 14 which are joined and locked together by means of special locking lugs 16.” (Col. 2, lines 25-28) Lind, in the specification and the Figures, at least fails to disclose an upper deck comprising a support material as currently claimed. Additionally, Lind at least fails to disclose an upper frame member supporting said upper deck as claimed, and hence fails to disclose foot members disposed in physical contact with an upper frame member.

Applicants respectfully submit that Lind fails to disclose several elements of Applicants claimed pallet. Hence, Lind fails to anticipate the present claims. Reconsideration and withdrawal of this rejection are respectfully requested.

#### Claim Rejections Under 35 U.S.C. § 103(a)

Claims 7-11 stand rejected under 35 U.S.C. § 103(a), as allegedly unpatentable over U.S. Patent No. 3,824,933 to Lind. Applicants respectfully traverse this rejection.

Establishing a prima facie case of obviousness requires that all elements of the invention be disclosed in the prior art. *In Re Wilson*, 165 U.S.P.Q. 494, 496 (C.C.P.A. 1970). If an independent claim is nonobvious under 35 U.S.C. 103, then any claim depending therefrom is nonobvious. *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988). Applicants respectfully submit that Claims 7 – 11, taken with all of the limitations of Claim 1 from which

they depend, define non-obvious subject matter. As noted above, Lind at least fails to disclose an upper deck comprising a support material, an upper frame member supporting the upper deck as claimed, or foot members disposed in physical contact with an upper frame member. Lind also fails to disclose the upper deck which comprises a composite polymer material (Claim 7).

The Examiner contends that

The use of different materials, such as fibrous polymers, woven polymers for the same well known characteristics would have been matters of desirability and choice and would have been and [*sic*] well within the level of ordinary skill in the art at the time of the invention...

(OA 10/06, page 3) The Examiner seems to be suggesting that any material would be obvious to use in the particularly claimed pallet. However, Lind actually contradicts this contention:

Although efforts have been made to make pallets out of other more durable and longer lasting materials, the expense and/or added weight of the pallets have proven impractical on any large scale basis.

Aluminum and plastic materials have been tried, because of their relative light weight, but with these materials another problem has been that only single faced pallets can be made, due to the mold forming process from which they are derived. This, in turn means even further expense in fastening and retaining two complementary pallet halves together, if a two faced pallet is desirable.

(Col. 1, lines 14 – 25) In other words, Lind discloses that issues can arise with the choice of materials; they are not merely interchangeable with an expectation of success.

Applicants note that obviousness is not based upon what an artisan *could do* or what an artisan *may try*, but is based upon what an artisan would be **motivated to do with an expectation of success**. Additionally, “[r]ejections on obviousness grounds cannot be sustained by mere conclusory statements; instead, there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness.” *In re Kahn*, No. 04-1616 (CAFC March 22, 2006) citing *In re Lee*, 277 F.3d 1338, 1343-46 (Fed. Cir. 2002); and *In re Rouffett*, 149 F.3d 1350, 1355-59 (Fed. Cir. 1998). “When the [Examiner] does not explain the motivation, or the suggestion or teaching, that would have led the skilled artisan at the time of the invention to the claimed combination as a whole, [it is] infer[ed] that the [Examiner] used hindsight to conclude that the invention was obvious.” *Id.*

In OA 10/06, the merely conclusory statement that “The use of different materials... would have been matters of desirability and choice”, is the only basis provided for modifying Lind with the specifically claimed materials of Claims 7 – 11. No motivation or expectation of success has been provided. Hence, no *prima facie* case of obviousness has been established.

Additionally, it is alleged that the use different materials “such as fibrous polymers, woven polymers for the same well known characteristics would have been matters of desirability...”. (OA 10/06, page 3) However, there is no explanation or documentary support defining the alleged “well known characteristics”.

The present claims are non-obvious over Lind. Reconsideration and withdrawal of this rejection are respectfully requested.

Claims 2, 13, and 14 stand rejected under 35 U.S.C. § 103(a), as allegedly unpatentable over Lind, and further in view of U.S. Patent No. 3,719,157 to Arcocha, et al. Applicants respectfully traverse this rejection.

As noted above, to establish *prima facie* obviousness of a claimed invention, all the claim limitations must be taught or suggested by the prior art. *In re Royka*, 490 F.2d 981, 180 USPQ 580 (CCPA 1974).

As also noted above, Lind fails to teach or suggest several elements of independent Claim 1. Lind also fails to teach or suggest several elements of independent Claim 12, e.g., at least the upper deck comprising a support material, an upper frame member supporting the upper deck, and foot members disposed in physical contact with an upper frame member.

Arcocha et al. do not cure the deficiencies of Lind. Arcocha et al. disclose a pallet having supporting pads formed in the bottom shell, wherein the supporting pads are reinforced with a foamed hardened plastic. (Abstract)

No motivation has been provided to modify the design of Lind to have supporting pads reinforced with foamed hardened plastic. No explanation has been provided as to an expectation of success of incorporating a foamed material into the design of Lind, e.g., the affect on the locking mechanism. OA 10/06 merely makes a conclusory statement that

Arcocha et al. teaches the use of providing foam material to provide additional support as old. It would have been obvious... to modify the structure of Lind to include... the... foam material...

(Page 3)

As noted above, a merely conclusory statement is not a valid basis for an obviousness rejection. The references must comprise both a motivation and an expectation of success. In the present case, not only has no motivation or expectation of success been provided, no basis for overcoming the deficiencies of Lind have been provided. No *prima facie* case of obviousness has been established. Reconsideration and withdrawal of this rejection are respectfully requested.

Claims 3 and 6 stand rejected under 35 U.S.C. § 103(a), as allegedly unpatentable over Lind, and further in view of U.S. Patent No. 6,199,488 to Favaron et al. Applicants respectfully traverse this rejection.

Again, Lind fails to teach or suggest several elements of independent Claim 1, e.g., at least the upper deck comprising a support material, an upper frame member supporting the upper deck, and foot members disposed in physical contact with an upper frame member.

Favaron et al. fail to cure the deficiencies of Lind.

Favaron et al. are relied upon to disclose “the use of providing a bend (fig. 4) to be old”.  
(OA 10/06, Page 4) Hence, it is alleged that it

would have been obvious... to modify the structure of Lind to include a bend in the foot member...since such structure is used in the same intended purpose of providing a placement guide thereby providing structure as claimed.

(*Id.*) In other words, it appears to be alleged, in a conclusory statement, that the redesign of Lind would be obvious because Favaron et al. illustrate a foot comprising a bend. It is not explained (i) why an artisan would be motivated to redesign Lind to include such a bend, (ii) where such a bend would be expected to be located, (iii) if the design of Lind would be compromised due to such bend, (iv) why the bend would meet the claimed element of the present Claim 3 (e.g., that the bend would be configured to engage a lip disposed at an edge of said upper frame member), or (v) how the bend would meet the element of the present Claim 6 (e.g., “reinforcement elements disposed adjacent to base

portions of said teeth of each plurality of teeth depending from said upper frame member and the lower frame member”). No *prima facie* case of obviousness has been established. Reconsideration and withdrawal of this rejection are respectfully requested.

Claims 15 and 16 stand rejected under 35 U.S.C. § 103(a), as allegedly unpatentable over Lind, and further in view of U.S. Patent No.2,908,464 to Traudt et al. Applicants respectfully traverse this rejection.

Here it is alleged that Traudt et al. teach the use of providing slit structures as the interlocking structure to be old. (OA 10/06, page 4) However, there is no explanation as to why an artisan would modify Lind’s structure to include a slit structure, whether or not such a structure is disclosed in Traudt et al. Merely the existence of various materials, various designs, and so forth, is not, in and of itself, motivation to redesign the pallet of Lind. Obviousness is not based upon what an artisan *could do* or what an artisan *might try*. Obviousness is based upon what an artisan would be **motivated to do with an expectation of success**. There, there is no motivation to modify the design of Lind, and there is no expectation of success. Furthermore, there is no explanation how the modification would affect or be incorporated into the current design of Lind. No *prima facie* case of obviousness has been established.

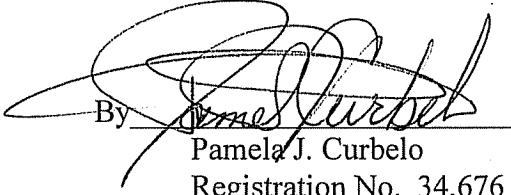
Considering that no motivation or expectation of success has been provided for the OA 10/06 proposed modification, the present claims are non-obvious over Lind in view of Traudt et al. Reconsideration and withdrawal of the present rejection are respectfully requested.

It is believed that the foregoing amendments and remarks fully comply with the Office Action and that the claims herein should now be allowable to Applicants. Accordingly, reconsideration and withdrawal of the objection(s) and rejection(s) and allowance of the case are respectfully requested.

If there are any additional charges with respect to this Amendment or otherwise, please charge them to Deposit Account No. 06-1130.

Respectfully submitted,

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